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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,
Petitioner,

vs.

TOM C. CLARK, JUSTICE; JOHN F. HASTINGS, CIRCUIT JUDGE; JOHN PAUL STEVENS, CIRCUIT JUDGE; FRANK J. McGARR, DISTRICT JUDGE, AND FRANCIS MUSCARE,
Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1975.

No.

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondents oppose the issuance of leave to file a Petition for a Writ of Mandamus and the issuance of such Writ commanding the United States Court of Appeals for the Seventh Circuit to vacate the judgment entered by it in this case on May 21, 1975. Respondents also oppose the issuance of a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on the same day.

QUESTIONS PRESENTED.

Whether a single judge District Court has jurisdiction to enjoin the Fire Department of the City of Chicago from suspending a permanent civil servant by means of summary procedures which violate his right to due process of law.

Whether a permanent civil servant may be summarily suspended from his job for twenty-nine days without pay absent any notice of the charges against him, opportunity for any hearing or opportunity to challenge those charges prior to the adverse action.

Whether this Court has jurisdiction to review one aspect of the decision of the District Court, when the District Court was reversed and remanded by the Court of Appeals on other grounds.

STATEMENT OF THE CASE.

On February 27, 1974, three administrators of the Chicago Fire Department entered the duty station where Respondent Lt. Francis Muscare, a permanent civil servant of twenty years seniority, was working as a firefighter, and ordered him from the job and the premises pursuant to a suspension levied against him as of that moment (R. 1, p. 2). Five days later, Lt. Muscare received a letter from Walter R. Braun, Chief of Personnel, informing him for the first time that he was being suspended for twenty-nine days for alleged violation of three provisions of the Rules and Regulations of the Chicago Fire Department (R. 1, Exh. "C"). By the letter from Braun, Lt. Muscare learned that he was charged with (1) disobedience of orders (Rules and Regulations of the Chicago Fire Department, § 61.006), (2) conduct unbecoming a member of the Chicago Fire Department (Rules and Regulations of the Chicago Fire Department, § 61.001) and (3) improper personal appearance (Rules and Regulations of the Chicago Fire Department, § 51.133) (R. 1, Exhs. "D," "E" and "F").

Immediately thereafter, Lt. Muscare filed this action in the United States District Court seeking a Temporary Restraining Order[1] restraining the continued imposition of this suspension against him on the grounds that: (1) his suspension violated his constitutional right to determine his own individual appearance; (2) that § 61.001 of the Rules and Regulations ("conduct unbecoming") is unconstitutionally vague, and (3) that the summary procedures by which the Petitioner suspended him from his job for twenty-nine days violated his constitutional rights to due process of law (R. 1 and 4).

Lt. Muscare set forth these three contentions in his initial Complaint and pursued them consistently throughout the litigation (R. 1). After the District Court denied his Petition for a Temporary Restraining Order, Lt. Muscare proceeded to a trial on his request for preliminary injunction, declaratory relief and damages. At trial, pursuant to his Complaint, Lt. Muscare presented his evidence supporting his challenge to the constitutionality of the Fire Department's suspension procedures (R. 17, pp. 77-82; 111-115). However, District Court Judge McGarr denied Lt. Muscare's requested relief, ruling solely on the grounds of the constitutionality of the personal appearance regulation (R. 15). Thereafter, Lt. Muscare specifically moved the District Court for reconsideration, to request a ruling on his separate and independent claims that the Rules and Regulations were unconstitutionally vague and that the procedures by which he was suspended constituted a violation of his rights to due process (R. 13, p. 7; Respondents' App. "A", pp. 2-3).[2] On appeal from the District Court's continued refusal to acknowledge the validity of his constitutional claims, Lt. Muscare raised to the United States Court of Appeals for the Seventh

1. Lt. Muscare also asked for declaratory judgment, damages and other relief.

2. Respondent is thus utterly unable to ascertain the basis for Petitioner's contentions that Muscare did not raise this issue at the inception of this litigation and consistently thereafter (Pet. Br., pp. 15, 18).

Circuit all three challenges to the action taken against him. Pursuant to Lt. Muscare's appeal, that Court ruled that Petitioner's procedures summarily suspending him without notice of the charges brought against him or opportunity for any hearing to respond to the accusations constituted an illegal deprivation of his property without due process of law (App. B, p. 11a).

Rejecting Petitioner's contention that the constitutional requirement of due process was satisfied by a hearing after the imposition of the suspension, the Court concluded simply:

> ". . . post-suspension review provided by State law, [Ill. Rev. Stat. ch. 24, § 10-1-18] is insufficient." (App. B, p. 9a.)

In thus rejecting Petitioner's contention that the procedures already available under Illinois law satisfied the requirements of due process, the Court of Appeals was not called upon to and did not pass on the constitutionality of that law itself. The Seventh Circuit held only that Petitioner's failure to provide any prior due process in the instant case violated Muscare's constitutional rights and that the separate procedures provided by State law for a review following the adverse action did not remedy the violation inherent in the Petitioner's procedures preceding the suspension (App. B, p. 11a).

ARGUMENT.

REASONS FOR DENYING THE WRIT OF MANDAMUS.

1. The District Court Had Jurisdiction Over This Challenge to the Constitutionality of the Procedures of the Chicago Fire Department.

From filing his Complaint through his appeal to the Seventh Circuit, in this action Lt. Muscare has consistently challenged the failure of the Chicago Fire Department to provide constitutionally acceptable procedures prior to his suspension.[3] By contrast, Lt. Muscare has never challenged the constitutionality of the Illinois law which provides a measure of protection for municipal civil servants in the form of a later review of adverse action (*Ill. Rev. Stat.*, ch. 24, § 10-1-18). Only Petitioner has attempted unsuccessfully to inject the issue of the Illinois statute into these proceedings, and Petitioners' present tardy attempt to question the District Court's jurisdiction by characterizing this action as an injunction against enforcement of Ch. 24, § 10-1-18 is equally without foundation. The Seventh Circuit ordered no such action, nor is such action required in this case. Ch. 24, § 10-1-18 provides:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

3. In his brief, Petitioner represents that a three judge court "was not required" when Lt. Muscare requested an injunction initially since "the injunction sought was only against enforcement of a local regulation by Defendant, a local official." (Pet. Br., p. 18). To the contrary, from the outset, Lt. Muscare's entire cause of action has been clearly set forth in his Complaint, detailing his challenge to the constitutionality of the procedures by which he was suspended. Even a cursory glance at the transcript of the proceedings before District Judge McGarr reveals that, indeed, at the hearing on a preliminary injunction Lt. Muscare specifically relied on his sworn Complaint detailing the summary manner in which he was separated from his employment, and that counsel for Lt. Muscare directed cross-examination of the Petitioner's witnesses to demonstrate that Petitioner wilfully attempted to place his action outside the restrictions of the state statute by selecting the twenty-nine day figure for the suspension (R. 17, pp. 111-114). If no three-judge court was required at the inception of this case as Petitioner here concedes, a three-judge court was never required, as this case did not change one iota from the filing of the Complaint to the filing of this Petition for Mandamus and Certiorari.

Thus, on its face, § 10-1-18 specifically excludes from coverage the pre-suspension treatment of municipal servants by their officers for suspensions of under thirty days. Under the terms of § 10-1-18, Petitioner was free to provide or fail to provide whatever procedures he chose prior to the imposition of discipline for less than thirty days. Accordingly, without violating the provisions of § 10-1-18, the Petitioner and his agents, the officers and administrators of the Chicago Fire Department, were able to engage in the summary practices employed against Lt. Muscare in this action. By suspending Lt. Muscare for a period of twenty-nine days, the Chicago Fire Department put its action beyond the restrictions of § 10-1-18 and freed itself to discipline Lt. Muscare merely by the unheralded appearance of three of his superior officers in his fire station. Respondent never contended and no Court has ever ruled that procedures for post-suspension review are unconstitutional or should be enjoined. The ruling of the Seventh Circuit in this action applies to Petitioner, a local official, in an area where the State has not acted—the pre-discipline procedures for disciplinary actions of fewer than thirty days.[4] Petitioner cannot now recast this litigation as an attack on a statute whose relevance to Lt. Muscare's cause of action exists only in Petitioner's mind.

Even assuming *arguendo* that § 10-1-18 has any application to this action, at most Illinois law may permissively allow city officials to undertake the unconstitutional procedures which the Seventh Circuit struck down. § 10-10-18 provides:

4. The Seventh Circuit specifically distinguished between the suspension under thirty days and the application of *Ill. Rev. Stat.*, Ch. 24, § 10-1-18 for suspensions beyond thirty days:

> Public employees facing temporary suspensions for less than thirty days have interests qualifying for protection under the due process clause . . . whether such persons should be granted the full panoply of rights envisioned in *Ill. Rev. Stat.*, ch. 24, § 10-1-18 *for suspensions greater than thirty days* is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension. (App. B, p. 11a) [emphasis added].

> "Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

However, under § 10-1-18, the unconstitutional acts in this case are still the acts of a local authority—the City of Chicago Fire Department. It is well-settled law that a three-judge court is not required where the questionable action authorized by the State legislature is of only local import. *Moody* v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); *Dusch* v. *Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967); *Board of Regents of University of Texas System* v. *New Left Education Project*, 404 U.S. 541, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972); *McCrimmon* v. *Dailey*, 418 F.2d 366 (7th Cir. 1969).

In *McCrimmon, supra*, the Seventh Circuit was confronted with a challenge to the validity of a Chicago City Ordinance making it unlawful for the holder of a liquor license to:

> *"engage, employ or permit the engagement or employment of any female person other than the licensee or the mother, daughter, wife or sister of the licensee to draw, pour or mix any alcoholic liquor, . . ."* (418 F.2d at 371).

The only state statute involved was a state enabling act providing:

> "In every city, village or incorporated town, the city council or president and board of trustees, and in counties in respect of territory outside the limits of any such city, village or incorporated town the county board shall have the power by general ordinance or resolution to . . . *prohibit any woman or minor, other than a licensee or the wife of a licensee, from drawing, pouring, or mixing any alcoholic liquor as an employee of any retail licensee.*" (418 F.2d at 371-2).

Even when confronted with this state legislation specifically setting out almost the exact language of the very ordinance whose constitutionality was challenged, the Seventh Circuit ruled that "the State statute concerned is merely permissive enabling legislation pursuant to which the critical City ordinance was enacted and enforced . . . There remains for consideration only a local city ordinance enforced by local officials. Clearly the requirements of 28 U.S.C.A. § 2281 are not satisfied here." 418 F.2d at 368-9. If a three-judge court was not required to hear the constitutional challenge in *McCrimmon*, this case is *a fortiori*. Unlike the State law in *McCrimmon*, nothing in § 10-1-18 affirmatively detailed Petitioner's right to suspend Lieutenant Muscare without any semblance of due process. Under § 10-1-18, unless the suspension is for more than thirty days, the Department is simply free to follow its own predilections in establishing procedures, as it has done in this case. These procedures were unconstitutional; the Seventh Circuit found them to be so; and the provisions of § 10-1-18 remain untouched.

Similarly, in *Dusch* v. *Davis, supra*, the court was confronted with a state statute authorizing the enactment by local authorities of a consolidation plan of borough government. Nonetheless, this court ruled that the consolidation plan for Princess Anne County, Virginia, enacted under authority of state law, was local only and not of state-wide application, and a challenge to the validity of the plan did not require convening of a three-judge court. Therefore, even assuming *arguendo* that § 10-1-18 may be construed to represent an opportunity for the Fire Department to pursue its unconstitutional procedures, this challenge to those procedures does not mandate a three-judge court, in direct contravention to the "oft repeated admonition that the three-judge court statute is to be strictly construed" (*Board of Regents, supra*, 92 S.Ct. at 655; *Allen* v. *State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)).

By contrast, in *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967),

on which Petitioner relies, a state statute of state-wide application mandated that County School Boards in the State were to be selected by delegates from local school boards. In order to challenge the composition of any county school board, Plaintiffs were forced to and did challenge the constitutionality of the state statute and invoke a three-judge court.[5] However, unlike the law in *Sailors*, the provisions of Chapter 24, § 10-1-18 providing for post-suspension review co-exist without conflict with a proper, constitutional, pre-suspension procedure. In order to attack the absence of pre-suspension procedures, Plaintiff need not and Plaintiff did not attack the constitutional validity of Chapter § 10-1-18 within its limited sphere.

Thus, in this action, the District Court possessed full jurisdiction to hear and the Seventh Circuit to review this challenge to the constitutionality of the procedures of the Chicago Fire Department, and Petitioner's request for a Writ of Mandamus is without merit and should be denied. For the same reasons, Petitioner's request for a Writ of Certiorari on these grounds should also be denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

1. The Decision of the Seventh Circuit Is in Full Accord with the Applicable Decisions of This Court.

As the Seventh Circuit specifically noted in its opinion, in reaching its decision in the instant case, it enjoyed the "benefit of the United States Supreme Court's recent decision in *Goss* v. *Lopez*, 95 S.Ct. 729 (1975)" (App.B, pp. 9a-10a). In *Goss*, this Court ruled that before suspending a student from a public

5. Similarly, in *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 55 S. Ct. 678, 79 L.Ed. 1322 (1935) cited by Petitioner, the Plaintiff unsuccessfully attempted to enjoin a criminal prosecution under New York State law which made it a state-wide misdemeanor to violate any provision of the Federal National Industry Recovery Act, 15 U. S. C. A. § 1701, *et seq.* Again, the Supreme Court specifically found that "the statute under attack attempted to establish a state-wide policy." (295 U. S. at 95).

school, the authorities must provide him with notice, an explanation of the evidence the authorities have, and an opportunity to present his side in order to protect the student from summary disciplinary action in violation of his rights to due process of law. In the instant case, involving the summary discipline of a permanent public employee, the Seventh Circuit concluded, "We think at least this much is required in the circumstances of a public employee's suspension" (App. B, p. 10a). As the Seventh Circuit ruled, after this Court's holding in *Goss, supra,* their decision in the case at hand was *a fortiori:*

> "Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake." (App.8, pp. 10a-11a).

Petitioner, however, contends that the decision in *Muscare* conflicts with the *Goss* holding, alleging that *Goss* "actually stands for the proposition that a public school student cannot be suspended or expelled unless he is granted a hearing either before or promptly after suspension or expulsion" (Pet. Br. p. 29). Directly contrary to Petitioner's representations, this Court ruled specifically in *Goss* that "as a general rule, notice and hearing should *precede* removal of the student from the school" (95 S.Ct. at 740) [emphasis added]. Further, this Court rejected the state's contention in *Goss,* almost identical to the Petitioner's argument here, that the constitutional requirements of due process were satisfied by a provision for post suspension judicial review, ruling that:

> "without a demonstration to the contrary, we must assume that delay will attend any § 2501.06 proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits." (95 S.Ct. at 740.)

Nothing in *Goss* authorizes a delay of hearing until after the imposition of discipline except a specific circumstance of imminent danger or disruption.[6] Petitioner's attempt to distinguish

6. The Seventh Circuit specifically dealt with the issue of imminent danger or disruption in its opinion in *Muscare* ruling that:

> "Even if we accept the Department's contention that the rationale behind its hair regulation is safety, a number of steps short of summary suspension are available to the Department pending a hearing on a violation of that regulation. Moreover, there is merit to appellant's comment in his brief that:
>
> > The present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974." (App. B, p. 12a).

the opinion of the Seventh Circuit in *Muscare* from *Goss* by thus misrepresenting this Court's opinion in *Goss* is without any foundation and must fail.

Similarly, as the Seventh Circuit noted, its decision in the instant case is confirmed by an examination of this Court's disposition of *Arnett* v. *Kennedy,* 416 U.S. 134, 94 S.Ct. 1633 ..... L.Ed.2d ..... (1974) (App.B., pp. 11a-12a, n.4). In that case, the plaintiff, a permanent federal civil servant had been accorded elaborate pre-discipline procedures including notice and an opportunity to be heard prior to his discharge. Contrary to Petitioner's representation in its brief, a majority of five justices did not find "due process to be satisfied" (Pet. Br., p. 26) by administrative procedures providing only for post-removal hearing. By thus characterizing this Court's decision in *Arnett,* Petitioner simply ignores the availability of elaborate pre-removal due process to the Plaintiff in that case. In *Arnett,* two of the five justices comprising the majority for the reversal of the District Court, specifically noted that:

> ". . . the affected employee is provided with 30 days advance written notice of the reasons for his proposed discharge and the material on which his notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to this case." Op. of Powell, *J.*, joined by Blackmun, *J.*, concurring (94 S.Ct. at 1652).

Far from holding, as Petitioner represents, that the due process requirements were satisfied by statutory provisions for post-removal hearings, the two concurring Justices specifically relied on the existence of elaborate pre-removal protection in coming to their conclusions, that the "present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests" (94 S.Ct. at 1652).

Similarly, a sixth member of the Court, Mr. Justice White, also relied on the existence of elaborate pre-discipline protections in finding that the statutory and regulatory provisions governing the discharge might meet constitutional requirements:

> "The statute's provisions *to the extent that they require 30 days advance notice and the right to make a written presentation* satisfy minimum constitutional requirements." (94 S.Ct. at 1664-5) [emphasis added].

Mr. Justice White demonstrated just how seriously he regarded the requirement of a fair pre-termination hearing for a public civil servant "before his wages are provisionally cut off" (94 S.Ct. at 1665) by dissenting from the result reached by the majority of the Court affirming Kennedy's discharge, because the person receiving evidence at the preliminary pre-termination hearing in *Arnett* was not a neutral individual. Thus, directly contrary to Petitioner's mis-representation that Justice White believed "it is sufficient if there is some kind of hearing at some time" (Pet Br., p. 28), Justice White dissented from the affirmance of the discharge in *Arnett* despite the existence of post-discharge review, because the prior hearing did not meet constitutional standards for a fair procedure.

Finally, three justices dissented completely from the Court's opinion in *Arnett*, holding:

> "I would affirm the judgment of the District Court, both in its holding that a tenured government employee must be afforded an evidentiary hearing prior to a dismissal for cause and in its decision that 5 U. S. C. § 7501 is unconstitutionally vague and overbroad as a regulation of employees' speech." (94 S.Ct. at 1670).

Thus, as six of the nine Justices in *Arnett* agreed, it is now well established that where, as here, the interest involved is the employment of a permanent, tenured, civil servant, elementary considerations of due process entitle him to an opportunity to hear the charges against him and present his responses prior to his separation from the property interest at stake. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972); *Goss* v. *Lopez, supra; Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972); *Arnett* v. *Kennedy, supra.* Speaking to the very issue of the timing of procedural due process in *Roth, supra,* this Court acknowledged that "when protected interests are implicated, the right to some kind of *prior* hearing is paramount" (408 U.S. 511 at 569-570). Citing *Boddie* v. *Connecticut,*[7] the Court continued, *"Before* a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing." *Id.* [emphasis added]. In sum, the decision of the Seventh Circuit mandating some pre-suspension procedures in this case accords completely with the recent decisions of this Court.

The decision of the Seventh Circuit in *Muscare* is also in accord with the decisions on this issue in the other federal courts.[8] *Skehan* v. *Board of Trustees of Bloomsburg State Col-*

7. 401 U.S. 377, 91 S.Ct. 780, 28 L.Ed. 2d 113. In *Boddie supra,* this Court ruled that under the due process clause, a state could not constitutionally deny access to its courts to persons seeking a hearing for a divorce. Defining some parameters of the due process clause, this Court noted:

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. (401 U. S. at 378-379) [emphasis in original].

8. As the Seventh Circuit noted in their opinion in *Muscare,* their holding that due process requires a pre-discipline procedure also accords with their own decision that even a college president may not be discharged until *after* a hearing. *Hostrop* v. *Board of Junior College No. 515, Etc., Ill.,* 471 F.2d 488, 494 (7th Cir. 1972), cert. den., 411 U. S. 935 (1973).

lege, 501 F.2d 31 (3rd Cir. 1974), vacated and remanded on other grounds, 95 S.Ct. 1986 (1975);[9] *Snead* v. *Department of Social Services, City of New York*, 355 F. Supp. 764 (S. D. N. Y. 1973), vacated and remanded for reconsideration on the grounds of mootness, 43 U. S. L. W. 3622 (1975). In *Skehan, supra*, the defendant college discharged a teacher several months prior to the expiration of his contract without any prior opportunity for an actual hearing. Despite the actions of the school administration before the discharge appraising the teacher in writing of his alleged transgressions and demanding a written reply, the District Court ruled and the Court of Appeals affirmed that by delaying the actual hearing until after the termination, the Board had denied the teacher his rights to procedural due process under the Fourteenth Amendment:

> . . . there is a substantial difference in the position of the parties once termination has actually occurred. First, the employee, cut off from the payroll, is greatly disadvantaged in his ability to pursue the hearing remedy. He may be forced by the necessity for survival to seek other employment which will foreclose the pursuit of reinstatement. Second, the institution will have made substitute teaching arrangements, thus introducing into the hearing consideration of the interests of other faculty members. This inevitability will increase whatever tendency may already exist for the hearing officials to defer to the administration's decision. We agree with the district court, therefore, that *a hearing after the fact is not the due process equivalent of the pretermination hearing required by Perry* v. *Sinderman, supra.* (501 F.2d at 38) [emphasis added].

Similarly, in *Snead*, the three-judge court ruled that New York State was obliged not only to provide pre-layoff procedures, but

9. Plaintiff Skehan appealed the Third Circuit's failure to award him damages and attorney fees from the public officials involved. *Skehan* was vacated and remanded for reconsideration of those questions in light of this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. ..... (1975) and *Wood* v. *Strickland*, 420 U. S. 308 (1975). The Third Circuit decision regarding the substantive question of due process was unchallenged on appeal and stands.

also to meet a high standard of due process for a pre-suspension hearing where it was acting to place a civil service employee on involuntary mental health leave. Ruling that a psychiatrist's recommendation was not a substitute for ordinary due process, the Court stated:

> We hold that defendants must conduct an adversarial hearing *before* placing Civil Service employees in permanent status on involuntary leave of absence for mental unfitness in the absence of exceptional circumstances requiring immediate action. (355 F. Supp. at 773) [emphasis added].

Just last month, the three-judge court in the Southern District of New York ruled again on remand that Snead was entitled to back pay and expungement of the layoff from her personnel file. The Court thus held that the state's action rescinding the layoff and reinstating Snead had not rendered the case moot, and reaffirmed that the State acted in violation of Snead's rights under the Fourteenth Amendment. *Snead, supra*, on remand, F. Supp. ..... (S. D. N. Y. 7/22/75). In sum, the decision of the Seventh Circuit in the instant case is not only grounded firmly in the consistent line of cases on this subject from this Court but also accords with the Seventh Circuit's own opinions and those of the Southern District of New York and Third Circuit in similar cases decided within the last two years.

2. Certiorari in This Case Is Not Warranted by Any Conflict with the Illinois Supreme Court Decision in Kropel v. Conlisk.

Petitioner also seeks certiorari from this Court on the grounds that the opinion of the Seventh Circuit that the procedures of the Chicago Fire Department are unconstitutional is in conflict with a recent decision of the Illinois Supreme Court, *Kropel* v. *Conlisk*, 60 Ill. 2d 17, 322 N. E. 2d 793 (1975). In *Kropel*, the Illinois Supreme Court was confronted with a challenge to the section of the Illinois Revised Statutes providing for dis-

cipline of police officers in cities over 500,000 (*Ill. Rev. Stat.* Ch. 24, § 10-1-18.1):

> **10–1–18.1 Police removals or suspensions—Cities over 500,000—Notice—Hearings—Determinations.]** § 10–1–18.1. In any municipality of more than 500,000 population, no officer or employee of the police department in the classified civil service of the municipality whose appointment has become complete may be removed or discharged, or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Police Board . . .
>
> Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held . . .
>
> A majority of the members of the Police Board must concur in the entry of any disciplinary recommendation or action.
>
> Nothing in this Section limits the power of the superintendent to suspend a subordinate for a reasonable period, not exceeding 30 days.

Kropel, a police officer in Chicago, had been suspended for thirty days without any prior due process; under § 10-1-18.1, unlike § 10-1-18, *supra*, p. 5, Kropel was not even entitled to a review of his suspension. In its decision, the Illinois Supreme Court essentially rewrote § 10-1-18.1 of the state statute, mandating the Police Board to provide in its regulations for appeal from such suspensions, despite the absence of any statutory requirement to do so.[10] After imposing on the Police Board an obligation to provide Kropel and the other Chicago Police with at least post-discipline review of suspensions numbering fewer than thirty days, the Illinois Supreme Court ruled that the Police Department's actions suspending Kropel with no *prior* hearing could be saved from constitutional attack.

10. The State Court ruled that the statutory provisions governing the police under § 10-1-18.1 must be made uniform with the statutory provisions for all other state and municipal civil servants, all of which provide post suspension appeal from suspension of more than one week.

Even assuming *arguendo* that the ruling of the Illinois Court was ever a valid statement of constitutional principle,[11] as the Seventh Circuit pointed out in *Muscare*, the *Kropel* Court "did not have the benefit of the United States Supreme Court's decision in *Goss* v. *Lopez*" (App. B, p. 9a-10a) reiterating the right to elementary due process prior to deprivation of a property interest cognizable under the Fourteenth Amendment. The conflict between the decision of the Illinois Court in *Kropel* and this Court's opinions in *Roth, supra; Arnett, supra* and *Goss* v. *Lopez* might be a basis for certiorari in *Kropel*, but that issue is not presently before this Court.[12]

In the case at hand, the Seventh Circuit has ruled, consistent with this Court's decisions in *Roth, Arnett* and *Goss* that the procedures of the Chicago Fire Department conflict with the provisions of the Fourteenth Amendment. Under the decision of the Illinois Supreme Court in *Kropel*, the Chicago Police Department is obliged to provide its members with a review procedure for under thirty day suspensions. By providing further for fair notice and hearing prior to such suspensions as well, the Police Department can conform to the Seventh Circuit's opinion in *Muscare* without violating any of the Illinois Court's decision in *Kropel*. There is thus no conflict requiring resolution by this Court, and the Petition for Certiorari should be denied.

11. The Illinois opinion is utterly devoid of any reference to the applicable decisions of this Court or of the U. S. Court of Appeals for the Seventh Circuit regarding the application of the due process clause to public employees. Nonetheless, the *Kropel* Court appears to conclude without any authority that due process will be satisfied if plaintiff Kropel is given an opportunity to seek review of his suspension, consistent with the rights of his counterparts outside the police force.

12. Rule 19(a) of the U. S. Supreme Court Rules providing for certiorari, "where a State court has decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this Court" might recommend this Court's review of the decision in *Kropel*, if that were at issue here.

3. The Ruling of the Court of Appeals Was Amply Supported by the Record in This Action.

Petitioner has represented to this Court that: "In fact, Muscare had ample notice of the charges against him and did respond to them. Furthermore, Muscare admittedly was in violation of Departmental Regulations and admittedly disobeyed an order of his superior office. The only issues to be settled were whether the Regulations and Order were constitutional and these questions could not be determined in an administrative hearing. These issues were judicially determined. Muscare received due process in abundance." (Pet. Br. pp. 30-31). Insofar as these issues of fact are relevant to this Petition for Certiorari, Petitioner is apparently attempting to contend that the decision of the Seventh Circuit was without sufficient basis in the record.

Petitioner contends that "In fact, Muscare had ample notice of the charges against him and did respond to them." To the contrary, it is uncontraverted evidence of record that after an ambiguous casual remark in December, Lieutenant Muscare was summarily separated from his job and income by the appearance of three of his superior officers in his fire house on February 27, 1974 with the curt order that he was being suspended and to turn in his equipment. Five days later, the Fire Department first notified Lt. Muscare of the Fire Department Rules that he had allegedly violated. At no stage of these proceedings did Petitioner refute Lt. Muscare's contention that he had been suspended for twenty-nine days prior to any notice of the Regulations he is alleged to have violated and consequently with no prior opportunity to respond to those charges. Indeed, as the Seventh Circuit found, "no hearing of any kind was afforded Appellant prior to his suspension." (App. B, p. 11a).

Petitioner's further contentions that: (1) "Furthermore, Muscare admittedly was in violation of Departmental Regulations

and Admittedly Disobeyed an order of his superior officers; the only issues to be settled were whether the regulations and order were constitutional and these questions could not be determined in an administrative hearing," and (2) "these issues were judicially determined. Muscare received due process in abundance" are not only without any foundation in this record; they are irrelevant to the ruling of the Seventh Circuit in this action. Since Lt. Muscare was not told of the identity of the charges against him until after he was suspended, he never had any opportunity to contest the validity of those charges. When pursuing his federal constitutional remedies in federal court, Muscare set forth the federal constitutional prohibitions against the actions being taken against him. The Court of Appeals correctly ruled that, regardless of what defenses against the Department's charges he would have made, he was constitutionally entitled to make them prior to being separated from his work.

Plainly, no later review could provide Lt. Muscare with the prior due process to which he was entitled before the suspension was levied against him. Petitioner's contention throughout this proceeding that Lt. Muscare's failure to "exercise his statutory right to an administrative review" (Pet. Br., p. 31) somehow precludes him from presenting his federal constitutional case challenging the absence of prior due process is utterly without any foundation in any applicable authority. It is well-settled law that, under 42 U. S. C. § 1983, a person may pursue his federal remedies without exhausting any available administrative remedies provided by the State system, *McNeese* v. *Board of Education for Community Unit School District 187*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Yet in face of this unbroken line of authorities establishing Muscare's unquestionable right to pursue his federal remedies for violation of his constitutional rights, Petitioner consistently reiterates the fact that Muscare failed to exercise his statutory right to administrative review, as if that had any bearing on this action.

Petitioner's conclusion that "Muscare was afforded due process in abundance" is nothing but a groundless, self-serving conclusion. Muscare's own pursuit of his constitutional remedies in federal court does not remedy the violation of his Fourteenth Amendment rights, a violation which was completed as of the moment on February 27, 1974, when his superiors ordered him from the premises of his fire station. To contend that a plaintiff's later pursuit of his constitutional remedies in federal court could somehow retroactively make up for an earlier violation of his constitutional rights to due process by his public employer is circular reasoning of the purest sort. Indeed, under that theory, the availability of a later federal action under the Fourteenth Amendment would completely negate any requirement for any due process hearing in any case, and states would be liberated to ignore the due process clause entirely.

4. This Court Is Without Jurisdiction to Determine the Validity of the Fire Department's Hair Rule.

Finally, the ruling of the Seventh Circuit reversing the District Court's denial of Muscare's relief begins again the proceedings in the District Court. In light of the Seventh Circuit's finding of a violation of Muscare's right to procedural due process, they were not required to determine whether or not the Fire Department's regulation governing personal appearance violated Muscare's constitutional rights, and the Court specifically withheld its opinion:

> "On this appeal, Lt. Muscare strenuously argues that this circuit's decision in *Breen* v. *Kahl*, 419 F. 2d 1034 (7th Cir. 1969) cert. den., 398 U. S. 937 (1970), compels a recognition of the "right to wear one's hair at any length or in any desired manner [as] an ingredient of personal freedom protected by the United States Constitution." 419 F. 2d at 1047, and requires an invalidation of the Department's regulation, absent any showing of "substantial justification" for the restrictions . . .

> . . . we find it unnecessary to resolve that controversy in this case, for appellant was suspended without procedural due process." (App. B., pp. 6a, 7a.)

Thus, this Court does not have before it any ruling from the Court of Appeals regarding whether or not the personal appearance regulations violate Muscare's constitutional rights, and there is no basis for this Court to rule on this issue. *Beilan* v. *Board of Public Education School District of Philadelphia*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1958) n. 3 at 402; *Carroll* v. *United States*, 354 U.S. 394, n. 2 at 396, 77 S.Ct. 1332, 1 L.Ed.2d 1442 (1957). Should this Court affirm the ruling of the Seventh Circuit, the question of the constitutionality of the appearance rule will remain beyond the scope of this case. The question of the appearance rule arises only if this Court should determine to reverse the ruling of the Seventh Circuit regarding procedural due process. In that case, the Court has jurisdiction itself to affirm the *result* reached by the Circuit Court on the alternative grounds that Lt. Muscare was subject to other violations of his constitutional rights[13] or simply to reverse the Court of Appeals and remand for their finding regarding the appearance rule. In no instance should this Court now rule to "affirm" the finding of a one judge district court regarding an issue on which the Court of Appeals has never ruled.

CONCLUSION.

In conclusion, the Seventh Circuit Court of Appeals ruled that the procedures of the Chicago Fire Department as enforced against Lt. Muscare in this case constituted a violation of his rights under the Fourteenth Amendment of the United States Constitution. In so deciding, the Seventh Circuit was following the decisions of this Court and of the other Courts of Appeals on this issue. Nothing in the opinion of the

13. *Helvering* v. *Gowran*, 302 U.S. 235, 58 S.Ct. 154, 82 L.Ed. 224; *S.E.C.* v. *Chenery*, 318 U.S. 80 63 S.Ct. 454 87 L.Ed. 626 (1943).

Seventh Circuit in this case warrants this Court taking the extraordinary action of certiorari or mandamus in the instant case, and no such writ should issue.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division.

FRANCIS MUSCARE,
Plaintiff,

vs.

ROBERT J. QUINN, individually, and as Commissioner, Chicago Fire Department,
Defendant.

No. 74 C 656

TRANSCRIPT OF PROCEEDINGS.

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 29, 1974, at the hour of 10:00 o'clock a.m.
Present:

Messrs. Jacobs, Gore, Burns & Sugarman (201 North Wells Street, Room 2122, Chicago, Illinois, 60606), by Mrs. Linda Hirshman, appeared on behalf of the plaintiff;

Mr. Richard L. Curry, Corporation Counsel, City of Chicago (City Hall, Room 511, Chicago, Illinois, 60602), by Mr. Phillip M. Sheridan, Assistant Corporation Counsel, appeared on behalf of the defendant.

[2] The Clerk: 74 C 656, Francis Muscare versus Robert J. Quinn, et certera, ruling on plaintiff's motion to reconsider previous ruling and for a further status report.

The Court: I have the motion for amendment of judgment filed by the plaintiff in this case, with a memorandum in support of it. And I have reviewed the matter. And it becomes, in effect, a motion for reconsideration of an earlier ruling.

And my ruling at this time is that the motion for reconsideration and the motion for amendment of judgment are both denied.

This leads me to inquire of you, Counsel, where we go from here; what is the next step?

Mrs. Hirshman: Your Honor, you were, in addition, going to rule on the remaining constitutional challenges, which were still open at the last hearing.

The Court: Well, they were implicit, were they not, in your motion for reconsideration?

Mrs. Hirshman: Well, the motion for reconsideration of the denial of the preliminary injunction. However, there was also a motion for ruling on the remaining issues. Your ruling—if your denial of my motions intends to encompass the other issues—

The Court: I recall your raising this point, but procedurally I really don't know what I can do concerning it. There was a motion for a preliminary—petition for a preliminary [3] injunction. We had a hearing on it and that was denied. Procedurally that is all I can do.

I regard your raising the remaining issues as an additional argument. And to that extent, my ruling, I suppose, is a ruling on those.

But what we have procedurally is a denial of a petition for a preliminary injunction; and that denial has just been reaffirmed. And where you go from there, I don't know. I would assume that you would want to go as fast to the Court of Appeals as you can.

Mrs. Hirshman: The only thing that remains open in my mind, your Honor, is that when you ruled on the preliminary injunction your findings of fact and conclusions of law were directed to one of three arguments which we raised. And before

we go to the Court of Appeals—or hopefully not requiring us to go to the Court of Appeals—I would like to ask you, as I thought I had last week, to rule on the remaining challenges.

The Court: Well, in effect, what I am saying is that you asked me to do so. I considered them—I considered them before, you argued them, in a sense, they are in your brief; and the denial of the petition for a preliminary injunction is deemed to be a ruling on all the challenges you raised,

Mrs. Hirshman: Thank you.

The Court: I think you have to so consider it.

Mrs. Hirshman: In that case, since we have no further [4] evidence to offer, I would ask that you make this a final ruling.

The Court: All right. The order will be that the preliminary injunction heretofore entered is made a final and permanent injunction, which in my mind renders it an appealable order. And see what the Court of Appeals has to say about it.

Mrs. Hirshman: Thank you, your Honor.

Mr. Sheridan: Thank you.

(Which were all the proceedings had in the above-entitled cause this date.)